

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE NEWELL,

Defendant-Appellant.

UNPUBLISHED

August 16, 2005

No. 255576

Wayne Circuit Court

LC No. 03-014091-01

Before: Cooper, P.J. and Bandstra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to consecutive prison terms of twenty-seven months to fifteen years for the armed robbery conviction and two years for the felony-firearm conviction. We affirm.

Defendant first contends that he was denied a fair trial due to prosecutorial misconduct. We disagree. “Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo.” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Defendant’s unpreserved claims of error, however, are reviewed for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). In that case, “[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.*

“[W]e consider issues of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant’s arguments.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). “[A] prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness,” *id.* at 276, but he may argue that, on the basis of the evidence, a witness is worthy or unworthy of belief. *Id.* at 455.

In closing arguments, the prosecutor emphasized the evidence that supported the complainant’s veracity. She argued that there was no evidence indicating that the complainant had any reason to lie. She also argued that his story remained consistent and that he had an honest demeanor on the stand. These statements do not amount to improper vouching based on implied special knowledge of the prosecutor. While defendant correctly points out that “a prosecutor may not suggest in closing argument that a defendant must prove something, because

such an argument tends to shift the burden of proof,” *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991), the prosecutor did not suggest the defendant must prove anything. Rather, she asserted that there was no evidence to suggest that a particular witness was lying. We discern no error in this regard.

The prosecutor also stated in closing argument that a not-guilty verdict would be tantamount to calling the complainant a liar. However, because defense counsel successfully objected to this statement, the jury was on notice that the statement was improper. Further, shortly after the prosecutor made this statement, the trial court instructed that jury members that they could find a witness to be honest, but simply wrong or mistaken. The trial court’s instruction was sufficient to cure any error with regard to this statement. Defendant has not shown that he was denied a fair trial by the prosecutor’s remarks.

Defendant also contends that the trial court erred in instructing the jury on flight when there was no evidence of flight. Defendant argues that this instruction implied a criminal state of mind that created an inference of guilt, and precluded the jury from finding defendant guilty of a lesser offense. We disagree. “This Court reviews claims of instructional error de novo.” *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). The relevant instructions are then examined in their entirety to determine if reversal is required. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, reversal is not required as long as the instructions “fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Id.* Jury instructions must include all elements of charged crimes, but must not exclude consideration of relevant issues, defenses, or theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

We agree that the instruction on flight was improper because there was no evidence of flight or an attempt to evade arrest. On the contrary, the officer in charge of the investigation testified that defendant made no such attempts. Although there was evidence that the assailant moved in the opposite direction of the complainant after the crime was committed, “mere departure from the scene is insufficient to give rise to ‘flight’ in the legal sense.” *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989). Therefore, the instruction on flight was inappropriate, and potentially misleading or confusing.

However, even if instructions are misleading or confusing, the validity of a verdict is presumed, and the defendant bears the burden of showing that it was more probable than not that the error was outcome determinative. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000). Defendant has not met this burden. This case hinged on whether the jury believed the complainant, particularly his identification of defendant as the perpetrator. The complainant testified that he knew defendant from school; they had attended seventh and eighth grade together. On the morning of the incident, defendant approached the complainant on the street. As defendant approached the complainant, he called out the complainant’s name. The complainant recognized defendant. The encounter lasted for approximately five to ten minutes in daylight and the two exchanged several words. Other than this testimony, there was no other evidence linking defendant to the crime. On this record, it is clear that if the jury believed that the complainant correctly identified defendant as the perpetrator, omission of the flight instruction probably would not have changed their verdict. Furthermore, the prosecutor did not argue flight as a basis for a guilty verdict. Therefore, in the context of the whole case, defendant

has not shown that omission of the jury instruction on flight would more likely than not have resulted in a not-guilty verdict.

We also reject defendant's claim that, without the flight instruction, he would have been convicted of a lesser offense. Evading arrest is not one of the elements of armed robbery, MCL 750.529, or felony-firearm, MCL 750.227b. Therefore, we are unpersuaded that omission of the instruction would more likely than not have resulted in defendant's conviction of a lesser offense.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly